IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88-1377

LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

BRIAN ZEBLEY, JOSEPH LOVE, JR., et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brian Zebley, Joseph Love, Jr. and Evelyn Raushi, on behalf of themselves and members of their class, respond in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

37 pp

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGES

CASES (Cont'd)

STATUTES AND REGULATIONS

RECASTING OF QUESTION PRESENTED

Are children seeking Supplemental Security Income disability benefits entitled to an individualized determination of all their impairments and functional limitations based upon the requirement of 42 U.S.C. § 1382c(a)(3)(A) that they be found disabled if their mental or physical impairments are of "comparable severity" to that which would cause an adult to be found disabled?

OPINIONS BELOW

The opinion of the court of appeals is reported at 855 F.2d 67 (cert. pet. 1a-20a). The memorandum and order of the district court are reported at 642 F. Supp. 220 (cert. pet. 21a-24a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1382c(a)(3)(A) provides in pertinent part:

> An individual shall be considered to be disabled * * * if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

42 U.S.C. § 1382c(a)(3)(G) (Supp. 1988) provides:

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

42 U.S.C. §§ 1382c(a)(3)(H) (Supp. 1988), 423(d)(5)(B) (Supp. 1988) provides:

> In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Secretary shall consider all evidence available in such individual's case record . . .

20 C.F.R. § 416.924 provides:

> We will find that a child under age 18 is disabled if he or she -
>
> (a) Is not doing any substantial gainful activity; and
>
> (b) Has a medically determinable physical or mental impairment(s) which compares in severity to any impairment(s) which would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s) -
>
> (1) Meets the duration requirement; and
>
> (2) Is listed in Appendix 1 of Subpart P of Part 404 of this chapter; or
>
> (3) Is determined by us to be medically equal to an impairment listed in Appendix 1 of Subpart P of this chapter.

20 C.F.R. § 416.920a(c)(3) provides:

> If you have a severe [mental] impairment(s) but the impairment(s) neither meets or equals the listings, we must then do a residual functional capacity assessment, unless you are claiming benefits as a disabled child.

20 C.F.R. § 416.925(a) provides:

> Purpose of the Listing of Impairments. The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity.

STATEMENT OF THE CASE

Statutory Framework

1. To complement the Social Security insurance programs, Congress in 1974 established the Supplemental Security Income (SSI) program for low income people who are over 65, blind or disabled. 42 U.S.C. § 1381. Congress extended SSI to poor disabled children in the "belief that disabled children who live in low-income households are certainly among the most disadvantaged of all Americans and that they are deserving of special assistance in order to help them become self-supporting members of our society." 1/

An adult is disabled under SSI if he or she "is unable to engage in any substantial gainful activity (SGA) by reason of any

---

1/ H. R. Rep. No. 231, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code, Cong. & Admin. News, 4989, 5133.

medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). A child is disabled for purposes of SSI "if he [or she] suffers from any medically determinable physical or mental impairment of comparable severity [to an adult]." Id. (emphasis added). Although Congress did not go further to define the "comparable severity" standard, a similar mandate of Congress conferring "comparable" benefits has been interpreted by this Court to require services or benefits that are not "inferior" and that insure an "equaliz[ing of] the level and quality of services." 2/

Additionally, statutory mandates insuring a methodology for the full evaluation of disability were made applicable to claims for children's as well as adults' benefits. Thus, Congress has required that in determining whether children are disabled, the Secretary "shall" consider the combined effect of all . . . impairments . . . throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(G). In enacting this requirement, Congress intended that the "total effect" of all impairments be considered by the Secretary. H.R. Rep. No. 618, 98th Cong., 2d Sess. 14 (1984) reprinted in, 1984 U.S. Code, Cong. & Admin. News, 3051-52. Similarly, Congress has mandated that "the Secretary shall consider all evidence available in [the claimant's] case record . . ." 42 U.S.C. §§ 423(d)(5)(B) (Supp. 1988), 1382c(a)(3)(H) (Supp. 1988).

2/ E.g., Wheeler v. Barbara, 417 U.S. 402, 422 n. 17, 425 (1974) (services for educationally deprived children).

2. Despite the "comparable severity" provision, the Secretary has established two markedly different regulatory tests to measure the disabling severity of the impairments of adult and child claimants. This very disparate treatment both in methodology and strictness of standard is at the heart of this case.

Under the SSI program, adults are evaluated using a five-step sequential evaluation process. 20 C.F.R. § 416.920; Bowen v. Yuckert, 107 S. Ct. 2287, 2290-91 (1987). If not screened out at steps one or two, an adult may prove disability by showing that he or she meets or equals a listed impairment, Heckler v. Campbell, 461 U.S. 458, 460 (1983). Such claimants are considered by the Secretary to be so severely impaired that they are deemed incapable of "any gainful activity." 20 C.F.R. § 416.925(a) (emphasis added). Included on the "Listings" are only impairments considered so severe that benefits are awarded without further inquiry into the claimant's medical limitations and vocational characteristics. Campbell, at 460. The Listings are defined in narrow terms of clinical medical evidence and do not purport to include all impairments that may be disabling. Claimants who do not satisfy the precise requirements of a listed impairment can be found disabled at step three if their impairments are considered "medically equal" to one of those on the list. In determining medical equivalence, however, the Secretary refuses to look at the overall functional consequences of impairments and, instead, confines his inquiry to matching precise clinical findings with those on his Listing. Social Security Ruling (SSR) 83-19.

If the adult's impairment does not meet or equal a listing, the Secretary then "must assess each claimant's individual abilities," Campbell, at 467, including whether he retains the capacity to pursue less demanding work based upon all medical and functional factors including "limitations that go beyond the symptoms that are important in the diagnosis and treatment of [the] medical condition," 20 C.F.R. § 416.945(a), as well as age, education and work experience. 3/ Such an individualized assessment allows for an appropriately flexible approach for situations that defy rigid compartmentalization. For example, it allows for decisions to be made for 1) claimants with multiple, combined impairments; 2) claimants with unlisted impairments; and 3) claimants with impairments whose symptomatology does not exactly match all of the elements or required proofs of a particular listing or who suffered from pain or other limiting symptoms.

3/ Campbell, 461 U.S. at 460-61, 467. See 20 C.F.R. §§ 416.920(a) and (f), 416.945. Through this "residual functional capacity" (RFC) assessment, the Secretary determines whether the adult can perform his or her relevant past work or, given the claimant's age, education and work experience, and medical condition, whether he or she can perform other work in the national economy. Id.

Although RFC is a "medical assessment" of what the claimant "can still do despite [his or her] limitations," 20 C.F.R. § 416.945(a), it broadly encompasses one's basic physical and mental functioning, § 416.945(b) and (c), embracing descriptions of limitations "that go beyond the [medical] symptoms," § 416.945(a), and from both medical and non-medical sources. SSA, Program Operations Manual System (POMS), DI 2097. See Marcus v. Bowen, 696 F. Supp. 364, 371-72 (N.D. Ill. 1988).

Children, on the other hand, are narrowly limited to an evaluation of whether they meet or equal the listings of impairments. 20 C.F.R. §§ 416.924(b)(2) and (3), 416.925. 4/ A realistic, "individualized determination" of the level of severity of a child's combined impairments, based on an assessment of the child's impaired functioning, is precluded by the sole reliance on the listings. The Secretary acknowledged that his child listings "interpret[ed] severity [of disability] in medical rather than functional terms." 42 Fed. Reg. at 14,706, ¶ 2 (1977). Despite the fact that residual functional capacity RFC) evaluations are "medical assessments" of severity of disability, note 3, supra, RFC determinations for children are clearly prohibited. 20 C.F.R. § 416.920a(c)(3). 5/

3. Listings provide an efficient administrative tool to award benefits quickly based on a "conclusive presumption" of disability, Bowen v. City of New York, 106 S. Ct. 2022, 2025 (1986), "without further inquiry" into the complete impact of the disabling impairments. Campbell, 461 U.S. at 460. See also Yuckert, 107 S. Ct. at

---

4/ Child listings are published as Part B to Appendix 1 of the regulations. 20 C.F.R., Part 404, subpt. P. However, the Part A adult listings also apply to children, as the Secretary requires that Part B applies only where Part A criteria "do not give appropriate consideration to the particular disease process in childhood." Preamble to Part B, 20 C.F.R., Part 404, subpt. P, App. 1.

5/ Functional impact indicators of childhood disability such as the need for special education or physical rehabilitation were explicitly "not considered" in the child listings. 42 Fed. Reg. at 14,706 (1977). Thus, the listings on their face preclude the "functional approach to determining the effects of medical impairments," which the Social Security Act contemplates. Yuckert, 107 S. Ct. at 2293.

2297. However, the Listings are not a complete compendium of disabling impairments. As SSA admitted promulgating the Part B Listing, the Listing only provides for an evaluation of "the more common impairments." 42 Fed. Reg. at 14,706, ¶ 4 (1977). See also 50 Fed. Reg. at 50,068, 50,069 (1985) (Part A Listing includes only "frequently diagnosed" conditions). As a consequence, the court below recognized that the discrete and limited child listings "identify only some comparable impairments," Zebley, 855 F.2d at 73-74 (cert. pet. 11a-13a). Although a few of the childhood listings incorporate some functional criteria, the childhood listings "do not cover the entire gambit of disabling childhood medical conditions, [n]or is there any evidence that they can determine the combined effect of separate impairments." Marcus v. Bowen, 696 F. Supp. 364, 381 (N.D. Ill. 1988). 5a/ The latter is so because the listings are defined in terms of single impairments and do not provide a basis for aggregating the effect of disparate impairments. See p. 12, n. 11, infra.

Not only are the childhood listings incomplete and incapable of determining the effects of multiple impairments, but they were intentionally drafted so that a claimant's condition does not meet or equal a listing unless the impairments "are considered severe enough to prevent a person from doing any gainful activity."

5a/ Marcus provides the most detailed historical review of the drafting and regulatory use of listings by the Secretary. Id. at 373-76. Marcus concluded that the government always "understood [listings] medical criteria to be a tool in the efficient administration of the disability program by screening for clearly disabled individuals - not as the dispositive step for persons who otherwise might be unable to engage in gainful activity." Id. at 373-74.

20 C.F.R. § 416.925 (emphasis added). See City of New York, 106 S. Ct. at 2025 (listings acknowledged by Secretary "to be of sufficient severity to preclude gainful employment" not merely substantial gainful activity). 6/ Adults who do not meet a listing receive an assessment of their residual functional capacity and may still be found disabled. Children who do not meet a listing are conclusively ineligible. The Secretary is therefore requiring children under 18 to have impairments of greater severity than those of adults in order to receive benefits. 7/

Individualized RFC Medical Assessment

4. The individualized determination which adult claimants receive after the listings stage of the evaluation process includes a medical appraisal of broad functional capacities in a vocational setting. 8/ This is much more individualized than comparison of each impairment to the listings, but it is still part of the "medical assessment." 20 C.F.R. § 416.945(a) (emphasis added). It is not part of the evaluation of the statutory vocational factors of age, education and work experience. This "residual fuctional capacity" (RFC) assessment provides a realistic, individualized determination of the

---

6/ The ability to engage in "any gainful activity" is the statutory test for disabled widow's benefits, 42 U.S.C § 423(d)(2)(B). By comparison, the lower statutory threshold for SSI is the inability "to engage in any substantial gainful activity." 42 U.S.C. § 1382c(a)(3)(A) (emphasis added). Tolany v. Heckler, 756 F.2d 268, 269-70 (2d Cir. 1985).

7/ Hernandez v. Bowen, No. C-87-582-JBH (E.D. Wash. July 21, 1988), p. 9.

8/ 20 C.F.R. § 416.945(a); Social Security Ruling 83-10.

level of severity of the medical impairment by looking at the basic physical and mental capacities of the individual, separate and apart from an evaluation of the explicit vocational factors detailed in the Act, 42 U.S.C. § 1382c(a)(3)(B), to determine the extent of the claimant's actual ability to work. 9/

Absent an RFC-type medical assessment, the Secretary never fully measures or considers the extent to which claimants for children's benefits are disabled. The Secretary's exclusive reliance on an incomplete, rigid checklist of impairments prevents consideration of the vagaries of individual circumstances, including the variable course of disease and affliction and the cumulative impact of different impairments. Contrary to the Secretary's claims, the court below did not require consideration of "vocational" factors applicable to adult claimants, only a full evaluation of the consequences of impairments on the ability of children to function. 855 F.2d at 73, 76 (cert. pet. at 11a-12a, 17a). Given the fact that some of the Secretary's Listings do encompass functional considerations, and his admission that RFC is a "medical assessment," 20 C.F.R. § 416.945(a), his argument that evaluation of functional effects is tantamount to vocational assessment is disingenuous.

9/ For a detailed analysis of this distinction and its obfuscation by the government in similar litigation, see Marcus, 696 F. Supp. at 372, 380-81. The distinction is significant because the Secretary discusses RFC as only a vocational factors analysis. In a similar vein, he presents the question here as if the Third Circuit had required him to incorporate vocational factors in the child disability process (cert. pet. at 12, 14-15). However, a medical determination of the functional capacities of a child would, under the Secretary's own RFC rationale, operate quite separately from the evaluation of purely vocational factors. See Marcus, at 372, 380-81.

Named and Intervening Plaintiffs and Amici Curiae

5. The named and intervening child-claimant plaintiffs, representing a certified class of other denied child-applicants or terminated beneficiaries (cert. pet. 6a), all illustrate the inflexible limitations of the listings and the markedly disparate treatment child claimants receive:

a) Brian Zebley, brain damaged at birth in 1978, suffered from congenital brain damage with spastic right hemiparesis, mental retardation, developmental delay, eye problems and musculoskeletal impairments and paralysis on his right side (cert. pet. 5a). Although Brian was initially awarded SSI at age 2 upon a finding that he met the mental retardation listing, he was terminated less than two years later on the grounds that he "no longer met or equalled the requirements of any section of the Listings of Impairments at Appendix 1" (id.). The Secretary found at an administrative hearing that "Brian Zebley has significant limitations compared with other children of his age," including very limited gross motor skills, spasticity and incoordination; misjudging of distances and frequent falling; and gross motion, self-help, and perceptual/fine motor skills were at or below 50 % of a normal child. 10/ Yet, because the Secretary adhered literally and inflexibly to the numerical developmental delay requirements of one child listing (mental retardation), and refused to make a broader, individualized assessment of

---

10/ (Jt. App. 26-27) (emphasis added). References are to the Joint Appendix filed with the Court of Appeals below.

impact of the brain damage on the overall functional limitations of this four year old's life, Brian's benefits were terminated. 11/

b) Joseph Love, Jr. was 10 years old in 1983 when he was denied SSI benefits despite uncontradicted evidence of organic brain syndrome manifested by psychiatric and neurological impairments, including a severe adjustment disorder with mixed emoticnal and behavioral disturbances and hyperkinesis. (Jt. App. 33, 36). 12/ Joseph failed first grade three times and could not even adapt to alternative special education classes, necessitating home-bound instruction. (Jt. App. 32). At the time of the ALJ hearing, this 10 year old was functioning on a kindergarten academic level although he had been in school for four years. (Jt. App. 34). Educational failures had left him with "severe emotional stress." Id.

11/ The mental retardation listing requires a delay in all developmental skills of no more than one half of the child's age. 20 C.F.R. Part 404, Subpart P, App. 1, § 112.05(A). At 48 months of age, although Brian showed developmental delay in all skills, and delay in gross motor and self-help skills as great or more than one-half his age, Brian's development of non-motor skills, like cognition and language, put him in the 36-42 month range. (Jt. App. at 26). The Secretary finds that a listing is met "only when [an impairment] manifests the specific findings described in the set of medical criteria for that listed impairment. A finding that an impairment meets the listing will not be justified on the basis of a diagnosis [such as congenital brain damage or mental retardation] alone." SSA, POMS, DI 2109.B (Jt. App. 90).

12/ Joseph also was diagnosed as suffering from an attention deficit disorder secondary to family stress and found "unable to relate with his peers, control his aggressions easily or learn." (Jt. App. 36). He went to sleep at 2:00 a.m., woke at 6:00 a.m., was unable to sit still, and constantly was climbing on top of things, sliding across the floor, running up and down steps, getting upset easily, and becoming depressed. (Jt. App. 32).

Because Joseph could undertake some "self-care" activities (such as washing the dishes "occasionally") (Jt. App. 32), he did not meet all four of the "listed" criteria for childhood psychosis or non-psychotic disorders (see App. 1, Part B to 20 C.F.R. Pt. 404, Subpt. P, §§ 112.03, 112.04, Jt. App. 180(a)). 13/ Thus, since the individualized medical evaluation of functional impairment available to adults was precluded for Joseph, 14/ the Secretary denied benefits to an extremely maladjusted and emotionally disturbed ten year old who suffered from organic brain syndrome and a severe adjustment disorder.

A psychiatric consultant in the Secretary's national Office of Disability with twenty years of experience, Dr. Jerome Shapiro, admitted that Joseph Love, Jr.'s symptoms appear "often" in both children and adults, and while he acknowledged that an adult with such symptoms could be found disabled by an individualized

---

13/ The relevant child mental disorder listings, "Psychosis of infancy and childhood" and "Functional nonpsychotic disorders," both require "marked restriction in the performance of daily age-appropriate activities; constriction of age-appropriate interests; deficiency of age-appropriate self-care skills; and impaired ability to relate to others . . . ." Part B, §§ 112.03 and 112.04 (emphasis added).

14/ The Secretary has issued a Social Security Ruling, SSR 85-16, to emphasize the "importance" and flexibility offered by an RFC assessment of an adult's mental disorder when the disorder does not meet or equal a listing. The Ruling, which specifically excludes "children under 18," requires a broad "overall assessment of the effects of the mental impairment" including evidence from social workers and family members in "assessing an individual's level of activities of daily living." SSR 85-16 (West's Soc. Sec. Rpting. Serv. pp. 424-28, Supp. Pmpht. 1988) (Jt. App. 194). See also 20 C.F.R. § 416.920a(c)(3) quoted on p. 3, supra.

assessment of residual functional capacity, a child with the "identical" symptomatology (who, like the adult, did not meet or equal the listings) would never be found disabled. (Jt. App. 71-74).

c) Evelyn Raushi was born mentally retarded in 1974, and was determined disabled upon meeting the listings beginning in 1979, but her benefits were subsequently terminated as of October, 1981 when the Secretary determined that her condition did not meet any listed impairment. (Jt. App. 42). Evelyn had an I.Q. of 64 and tests given by the Secretary's consultative psychologist also revealed "emotional immaturity and intellectual and social impoverishment consistent with [her] development delay"; "significant latent anxiety"; and, in addition to mental retardation, diagnoses of "developmental learning disorder", and "minimal brain dysfunction." (Jt. App. 44-45).

Although the Secretary found that Evelyn had suffered from mental retardation with an I.Q. in the 60-69 range, the evidence did not establish that she also suffered from a "significant impairment" other than the mental retardation. Thus, the Secretary concluded that the girl did not "meet or equal" the mental retardation listing, Section 112.05(C) of Part B of the listings. (Jt. App. 45-46). 15/ The Secretary's policies thus totally precluded the more flexible, individualized evaluation of this mentally retarded and

---

15/ This mental disorder listing requires that a child diagnosed as impaired by mental retardation with an IQ between 60 and 69 must also show a "physical or other mental impairment imposing additional and significant restriction of function or developmental progression." 20 C.F.R. Pt. 404, subpt. P, App. 1, § 112.05(C).

emotionally disturbed girl's overall functioning. An adult would have received such consideration. 16/

d) Three separate amicus briefs filed below on behalf of over two dozen disability and children's organizations nationally further established that class members include severely disabled children with such impairments as spina bifida, Tourette Syndrome, Down's Syndrome, microcephaly and Prader-Willi Syndrome who have been "routinely rejected for SSI under the listings criteria." (Am. Br. of Pa. Protection & Advocacy, Inc. at 1-3, 20). An amicus brief submitted by the Spina Bifida Association of Greater Los Angeles, et al., points out that many of the functional limitations of children suffering from spina bifida, such as gastrostomy tubes, tracheostomies and shunts from the brain, are not even recognized in the listings, resulting in such children being denied SSI. (Am. Br. at 2 as cited in 855 F.2d at 72-73 (cert. pet. 10a)).

Lower Court Decisions

6. The district court on October 12, 1984 granted Brian Zebley's motion for partial summary judgment, ordering payment of benefits and remanding for their calculation. (cert. pet. 6a). On March 13, 1985 and April 23, 1987 the court also remanded the claims of Evelyn Raushi and Joseph Love, Jr., respectively. (Id.) However, the court granted the Secretary's motion for summary judgment, dismissing the class claims. While noting that "[p]laintiffs' argument [as to the inadequacy of the listings test] may well be valid," the

---

16/ See Social Security Ruling 85-16, note 14, p. 13, supra.

court was not prepared to find the Secretary's overall policy invalid. (Id. at 249).

7. Following plaintiffs' appeal to the Court of Appeals for the Third Circuit, the unanimous court found the child regulations to be "inconsistent with the statute in precluding a finding that a child is disabled unless his impairment meets or equals a listed one." (cert. pet. 12a). The court determined that, "Congress has expressed unambiguously its intent that 'any' impairment which meets the statutory standard shall be found disabling. Therefore, the Secretary's regulatory method for determining disability must be adequate to identify any qualifying impairment." (id. at 11a) (emphasis in original). The court reasoned that the listings, designed to reveal the most severely disabled claimants for quick, presumptive awards, "do not purport to be an exhaustive compilation of medical conditions which could impair functioning to the extent necessary to satisfy the statutory standard for disability," yet only adults are given the further opportunity to establish eligibility through an "individualized assessment of the actual degree of functional impairments . . . ." (id. at 11a-12a) (emphasis in original). Because it was the expressed intention of Congress to allow children to show they suffered from "any" impairment of "comparable severity" to one "which would actually, even if not presumptively [via the listings], disable an adult," the Secretary's regulatory method identifying "only some comparable impairments" was held to be inadequate. (id. at 12a-13a) (emphasis in original).

The Secretary appeals from this decision of the Third Circuit which by its terms does not set forth any relief for the class.

REASONS WHY THE PETITION SHOULD BE DENIED

Introduction

The Secretary has misrepresented the Third Circuit's decision as presenting the question of requiring analogous consideration of vocational factors, the specific approach rejected by Powell v. Schweiker, 688 F.2d 1357 (11th Cir. 1982) and Hinckley v. Secretary of HHS, 742 F.2d 19 (1st Cir. 1984). Rather, the decision in Zebley requires for disabled children "an opportunity for individualized assessment of their functional limitations" (855 F.2d at 77; cert. pet. 20a), an evaluation fully in accord with the Social Security Act and prior decisions of this Court. Such a holding ensures a consideration of the severity of all a child's impairments, not just those in the listings. There is thus no conflict with the Hinckley and Powell decisions because the Third Circuit did not mandate consideration of vocational factors. And because the actual holding of the Third Circuit is so clearly correct, this Court's review of that decision is not warranted.

I. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION BELOW AND THE DECISIONS OF THE FIRST AND ELEVENTH CIRCUITS

The decision of the Third Circuit poses no conflict to Powell and Hinckley and, rather, is in accord with the uniform line of cases that have, in the adult setting, held that sole reliance on the listed impairment standard is too restrictive under the Act. 17/ The

---

17/ See, e.g., Lewis v. Weinberger, 541 F.2d 417, 420 (4th Cir. 1976); Whitt v. Gardner, 389 F.2d 906, 910 (6th Cir. 1968); Murphy v. Gardner, 379 F.2d 1, 8 (8th Cir. 1967). Cf. Bowen

Hinckley and Powell courts each read the single plaintiff's claims as urging adoption for disabled child cases of vocational criteria similar to the adult work test criteria. For example, the district court in Powell viewed plaintiff's challenge as going to "the Secretary's failure to use factors comparable to vocational factors for adults . . . ." 688 F.2d at 1359, n. 5. 18/ Both courts upheld the child regulations, finding that Congress did not require application of vocational factors to child SSI claims or an inquiry into whether a child claimant could work were he an adult. 19/ But as the Marcus court recently observed, "Powell and Hinckley did not address the inadequacies of the Listings . . . . Th[ese] decisions are relevant insofar as they hold that Congress did not require application of vocational factors to child SSI claims." 696 F. Supp. at 381. Thus, since the imposition of vocational-type factors was not pursued by Zebley plaintiffs nor adopted by the Third Circuit, which did address

---

18/ See also Hinckley, 742 F.2d at 23 (plaintiff's urging non-medical criteria to be applied in the setting of a "vocational factors' test").

19/ The Powell court relied on a post-enactment Senate Finance Committee Staff Report explaining why "nonmedical vocational factors were not applied." 688 F.2d at 1362. Similarly, Hinckley relied on legislative history to hold that the "substantial gainful activity" standard was inappropriate as well as any inquiry by the Secretary as to "'whether the [child] could work were he an adult.'" 742 F.2d at 23.

the listings' inadequacies, there is no conflict with the First and Eleventh Circuit decisions. 20/

Further, the Hinckley court assumed, 742 F.2d at 23, as the Secretary emphasizes in his certiorari petition at 12, that individualized assessments are provided by allowing children to prove that their impairments are medically equivalent to a Part B listed childhood impairment. See 20 C.F.R. § 416.926(b). Yet the Hinckley court never was presented with the Secretary's policy in Social Security Ruling 83-19 on equivalency determinations which totally precludes consideration of the functional consequences of impairments: "[I]t is incorrect to consider whether the listing is equaled on the basis of an assessment of overall functional impairment . . . The functional consequences of the impairments . . . irrespective of their nature or extent, cannot justify a determination of equivalence." SSR 83-19 (emphasis in original). Since "[i]t is only impaired ability to function which results in disability," Zebley, 855 F.2d at 74, these determinative factors in any disability are foreclosed in the Secretary's equivalency determinations. Equivalency policy thus is a source of unfairness in the Secretary's methodology rather

---

20/ The fact that the Zebley court said it was not following Powell and Hinckley does not change the analysis, as it is what Zebley held as against what these other two courts held which is decisive for purposes of determining whether a conflict exists requiring this Court's resolution. Apparent conflicts of decisions may disappear upon closer analysis. See Stern & Gressman, Supreme Court Practice, sec. 5.15, p. 370 (5th ed. 1978). "There must be a real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Id. sec. 4.3, p. 264. Only through the Secretary's misstatement of the issue here is a split in the circuits manufactured.

than providing the flexibility the Hinckley court erroneously assumed. See Zebley, at 74 (cert. pet. 13a). 21/

Moreover, equivalency determinations are still circumscribed by the relevant childhood listings in Part B of Appendix 1 of the regulations. The Secretary has admitted that these childhood listings "are based on the concept of 'comparable severity' to the [adult Part A] Listing of Impairments published in the appendix [for Title II wage-earners]," 42 Fed. Reg. 14705 (1977), and not comparable to the statutory substantial gainful activity standard. 22/ Thus, whatever breadth the equivalency determination may have, it cannot extend beyond the severity levels set by the listings which the Secretary deems higher than that set forth in the statute. See pp. 8-9, supra.

Finally both Powell and Hinckley were decided before Congress codified the mandates that "the Secretary shall consider the combined effect of all of the individual's impairments . . . throughout the disability determination process," Sec. 4(b) of the Social

---

21/ See also Marcus, 696 F. Supp. at 372-73, 378-79. The restrictive medical equivalence policies of SSR 83-19, becoming effective in 1980, resulted in a major drop in equivalence allowances from 45.1 % in 1976 to 8.7 % in 1984. House Committee on Ways and Means, WMCP 99-14, "Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means," 99th Cong., 2d Sess., p. 114, Table 2 (March 3, 1986). The record in this case also establishes via deposition of the Secretary's medical compliance review officer, Dr. Maurice Prout, that equivalence decisions are "hardly ever utilized in mental cases." (Jt. App. 62).

22/ The Secretary's listings regulation, 20 C.F.R. § 416.925(a) makes it clear that its purpose is to establish a higher severity threshold than is in the statute. See note 6, supra and City of New York, 106 S. Ct. at 2025.

Security Disability Benefits Reform Act of 1984, Pub. L. 98-460, 98 Stat. 1800, 23/ and that "the Secretary shall consider all the evidence [of disability] available in such individual's case record . . . ." Sec. 9(b)(1) of the Reform Act, 98 Stat. 1805. 24/

The Reform Act notwithstanding, myriad restrictive and inflexible policies preclude an evaluation of the functional impact of the "combined effect" of impairments and of "all the evidence" of disabling limitations at the "meet or equal" listings step, see, e.g., 42 Fed. Reg. 14705 (1977); SSR 83-19. 25/ "By the Secretary's own admissions, it is clear that the Listings . . . do not measure the combined effect and impact of the claimant's impairments . . . ." Marcus, 696 F. Supp. at 378.

The only method now available to the Secretary to consider these "combined effect" policy and "all evidence" mandates is the residual functional capacity assessment, an evaluation available only to adults. See 20 C.F.R. § 416.920a(c)(3). Zebley is fully in accord with these new statutory directions by requiring an individualized determination of the degree of functional incapacitation

---

23/ 42 U.S.C. § 1382e(a)(3)(G) (Supp. 1988). This mandated consideration of the combined effect and impact of impairments is in accord with the prior established congressional intent that each claimant's functional limitations be individually and realistically assessed. See Yuckert, 107 S. Ct. at 2293, 2304.

24/ 42 U.S.C. §§ 1382e(a)(3)(H) (Supp. 1988), 423(b)(5)(B) (Supp. 1988).

25/ The Secretary "has refused to give claimants under 18 an opportunity to prove disability based upon consideration of 'all the pertinent facts.'" Powell, 688 F.2d at 1364 (dissent) (pre-Reform Act holding).

during this additional evaluative step. 855 F.2d at 76, 77 (cert. pet. 18a, 20a). Powell and Hinckley predate the Reform Act and should not be considered good law on this important point.

II. THE DECISION OF THE COURT OF APPEALS BELOW IS SO CLEARLY CORRECT THAT THIS COURT'S REVIEW OF THAT DECISION IS NOT WARRANTED

Congress never intended that the methodology utilized by the Secretary be one to preclude a full evaluation of disability or that a markedly stricter severity of disability standard be imposed through sole reliance on listings of impairments. 26/ No deference is due the agency's interpretation of a standard inconsistent with congressional intent. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). As such, the Secretary's policy was properly rejected by the court below. Securities Industry Ass'n v. Board of Governors of Federal Reserve System, 468 U.S. 137 (1984). Through the children's "comparable severity" provision of 42 U.S.C. § 1382c(a)(3)(A), Congress explicitly ordered that the same or equivalent adult level of severity of disability be established for the evaluation and award

---

26/ In establishing the SSI disability program Congress stressed a uniformity of approach in methods and standards by providing that the "definition of disability . . . used in the disability insurance program [42 U.S.C. § 423(d)(1)(A)] . . . would be generally applicable to disabled in the SSI program." H.R. Rep. No. 231, 92d Cong., 2d Sess. reprinted in 1972 U.S. Code, Cong. & Admin. News at 5233. See City of New York, 106 S. Ct. at 2024.

of benefits to children. 27/ A comparability requirement in a federal benefits statute requires an "equaliz[ing of] the level and quality of services." Wheeler, 417 U.S. at 425.

In addition, this Court has repeatedly viewed the Title II (disability insurance) and Title XVI (SSI disability) programs as having two prime thrusts: The first is that our disability law demands no less than a "functional approach to determining the effects of medical impairments." Yuckert, 107 S. Ct. at 2293 (majority op.) and 2304 (dissenting op.). The second is that the statute contemplates "individualized determinations" of these functional limitations which "assess each claimant's individual activities." Campbell, 461 U.S. at 467. As a consequence, the Secretary's analogous reliance solely on the mental disorder listings to determine whether mental impairments can be disabling has been rejected in favor of a "'realistic, individual assessment of each claimant's ability to engage in substantial gainful activity.'" City of New York, 106 S. Ct. at 2027 and n. 5.

The listings of impairments were never designed to provide the complete, individualized determinations of all functional limitations. 42 Fed. Reg. 14,705 (1977). The role of the listings in the disability evaluation process was intended to "streamline the decision process by identifying claimant" with the most severe medical

---

27/ 1972 U.S. Code, Cong. & Admin. News at 5134. Such equal treatment furthered the basic goal of establishing a uniform disability standard for all recipients of the new SSI program. See also 117 Cong. Rec. 21089 (1971) (floor statement of Rep. Wilbur Mills, Chairman, House Committee of Ways and Means).

impairments, Yuckert, 107 S. Ct. at 2287, and to allow an award of benefits quickly, based on a "conclusive presumption" of disability. City of New York, 106 S. Ct. at 2025.

Thus, in promulgating the Part A listings, the Secretary admitted that the list is incomplete and only contains impairments which occur frequently. 50 Fed. Reg. at 50069 (1985). Similarly, in promulgating the Part B listings applicable to children, he stated that the methodology listings provide "a means to efficiently and equitably evaluate the more common impairments." 43 Fed. Reg. at 14,706 (1977). These gaps in the listings are not closed by the inclusion of a "medical equivalence" assessment because, as noted above at p. 19, the Secretary has effectively eviscerated this assessment by forbidding his adjudicators to find a listed impairment "equalled" on the basis of the functional consequences of a claimant's impairments. SSR 83-19. In sum, children whose impairments are not listed, are not given a meaningful chance to prove that their impairments are of "comparable severity", and are denied benefits even though they may be as disabled, or more disabled, than children with listed impairments.

Moreover, the Secretary has been under an explicit statutory duty imposed by the 1984 Social Security Disability Benefits Reform Act, Pub. L. 98-460, Sections 4(b) and 9(b) to "consider the combined effect of all of the individual's impairments . . . throughout the disability determination process," and "to consider all the evidence [of disability]." 42 U.S.C. §§ 1382c(a)(3)(G) and (H) (Supp. 1988) at p. 2, supra. Most severely disabled child claimants, such

as Brian Zebley and Joseph Love, Jr. here, have multiple impairments, see pp. 11-14, supra. Yet, there is no way by which this "combined effect" evaluation can be accomplished within the listings without a further individualized assessment of functional limitations comparable to the RFC assessment, see 20 C.F.R. § 416.945(d), which adults receive. 28/

Thus, the Third Circuit was fully correct in its conclusion that the discrete and narrow childhood listings "identify only some comparable impairments." 855 F.2d at 73-74 (cert. pet. 11a-13a). See also Marcus, 696 F. Supp. at 378, 381.

In addition to not fully assessing the severity of children's impairments, the Secretary, by sole reliance on the listings for evaluation of children, has established a standard of severity that is more strict than that applied to adult claimants. The Part A adult listings are defined to include impairments that are so severe as to preclude performance of "any gainful activity," 20 C.F.R. § 416.925(a), a stricter standard than the statutory "any substantial gainful activity" test. 42 U.S.C. § 1382c(a)(3)(A) (emphasis added). 29/ The Part B childhood listings also embody this heightened test. As the Secretary stated in promulgating the Part B [adult] listings, its criteria "are based on 'comparable severity'

28/ Marcus, 696 F. Supp. at 378, 381 (Secretary admits and there is no evidence that the Secretary can determine through the listings the combined effect of separate impairments).

29/ See City of New York, 106 S. Ct. at 2025 ("The listings consist of specified impairments acknowledged by the Secretary to be of sufficient severity to preclude gainful employment.").

to the Listing of Impairments" and that when a child reaches age 18, he or she could be expected to satisfy the criteria of the Part A Listing. 43 Fed. Reg. 14,705 (1977). This "any gainful activity" standard is, on its face, higher than, not comparable to the statutory SSI standard for adults of inability to "engage in any substantial gainful activity." 30/

Not only do the listings set a severity threshold higher than the statute provides for, but, as the Secretary also admitted when he first promulgated the Part B childhood listings, they "interpret severity [of disability] in medical rather than functional terms." 42 Fed. Reg. at 14,705. Indicators of functional impact, such as Joseph Love's failing first grade three times and being unable to sustain himself in a special education class for mentally disturbed children, supra at 12, were explicitly excluded from the childhood listings. 42 Fed. Reg. at 14,706 (needs for "special education

---

30/ In the widow's disability insurance program Congress did legislate the stricter disability standard of inability to engage in "any gainful activity" as opposed to to the SSI program's "any substantial gainful activity." 42 U.S.C. § 423(d)(2)(A). Yet despite the Secretary promulgating a disability evaluation for widow's, like for children, based solely on the listings of impairments, 20 C.F.R. § 404.1578, courts have held that even with a heightened statutory severity standard, the Secretary cannot fail to evaluate all evidence of functional impairment to get a realistic view of the severity of the impairment or to measure the combined impact of multiple impairments. E.g., Tolany v. Heckler, 756 F.2d 268, 272 (2d Cir. 1985); Paris v. Schweiker, 674 F.2d 707, 710 (8th Cir. 1982); Marcus v. Bowen, 696 F. Supp. 364, 379 (N.D. Ill. 1988).

. . . are not included"). 31/ By reading out the consideration of functional impairment from his medical inquiry of "severity" of impairment, the Secretary has contravened the Act which "defines 'disability' in terms of the effect a physical or mental impairment has on person's ability to function . . . ." Campbell, 461 U.S. at 459-60 (emphasis added). See also Yuckert, 107 S. Ct. at 2293 (Act's "functional approach to determining the effects of medical impairments"). 32/

The Secretary has failed to demonstrate that Congress ever ratified or approved his use of the listings as the sole test for the children's program. See Comm'r of Internal Revenue v. Glenshaw Glass Co., 348 U.S. 426, 431-32 (1955); Assoc. of American R.R. v. ICC, 564 F.2d 486, 493 (D.C. 1977). 33/ The only congressional

---

31/ The Secretary's certiorari petition admits as much in its circumspect representation that only "some of the Secretary's listings in Part B specifically call for a general assessment of a child's functional capacity" (p. 12) (emphasis added).

32/ Yuckert construed the term "severity" and addressed itself to how severity is measured. This case requires interpretation of the same term in the same statutory sentence dealt with in Yuckert. The question here is not only what does "comparable" mean, but what does "severity" mean in the context of a disability program as one cannot determine whether impairments are "comparable" unless one measures how severe they are. This Court's basis for upholding the severity regulation in Yuckert was that the regulation embodied a medical inquiry into the degree of functional impairment. 107 S. Ct. at 2293. This is in direct conflict with the children's disability policy that consideration of function is not part of medical severity.

33/ This Court, in upholding the "severity" regulation in the Secretary's sequential evaluation process, relied upon explicit "expression of approval" of it by Congress and legislative history "expressly endors[ing] the severity regulation." Yuckert, 107 S. Ct. at 2294-97.

statement cited by the Secretary is the provision that SSA publish children's listing "criteria," Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2685. Yet there is no evidence of any intent that these criteria were intended to be the only test employed. This 1976 enactment is explained by the fact that the Secretary, four years after the enactment of the children's SSI program, had been "extraordinarily slow" in developing any guidelines similar to the adults listings, and although "draft regulations with criteria" were circulating, Congress determined that uniformity required their prompt promulgation. Sen. Rep. No. 1265, 94th Cong., 2d Sess., 24-25, as reprinted in 1976 U.S. Code, Cong. & Admin. News 5997, 6018-19.

It is true that the floor statements of Senators Bentsen and Hathaway reflect that "vocational ability" was not intended to be considered involving children's disabilities. 122 Cong. Rec. 33301, 34026 (1976). But as Senator Hathaway stated, the children's assessment, "[l]ike the test for determining the disability of an adult," was "not [to be] determined solely on medical grounds" but rather upon "an evaluation of the impact of the disability on the person's abilities." 122 Cong. Rec. 34026 (1976). With such an individualized impact test, the focus, he said, should be on the child's "ability to function successfully within age-appropriate expectations." 34/ Contrary to the Senators' expectations that the

---

34/ Senator Hathaway continued: "The child's functional capacity within the areas of learning, language, self-help skills, mobility and social skills are decidedly more meaningful in determining both the severity of the impairment and the developmental potential of the child." Id. at 34026.

criteria for children would evaluate functional impacts and would not be "restrictively drawn," 122 Cong. Rec. at 34026, the listings criteria ultimately published "interpret[ed] severity in medical rather than functional terms," as the Secretary explicitly acknowledged. 42 Fed. Reg. 14,705 (1977). 35/

The Third Circuit ordered only that disabled children receive the same type of individualized, realistic assessment of the functional limitations of their impairments as adults, and gave the Secretary considerable leeway to establish appropriate methods of conducting this assessment. It is significant to this Court's certiorari determination that the order appealed from does not provide any relief and that the Secretary's speculative complaints about the scope of relief are not ripe and not before the Court. In light of the absence of any conflict with other circuit decisions (except as created by the Secretary's misstatement of the issue and decision of the Third Circuit), and the soundness of the Zebley decision, this decision should not be reviewed by the Court.

35/ Despite the Secretary's assertion of congressional oversight (cert. pet. at 15, n. 4), in over 15 years there has been virtually no oversight of the children's SSI disability program. Rather than receiving "frequent and intense congressional attention," Schweiker v. Chilicky, 108 S. Ct. 2460 (1980), SSI disabled children claimants have been largely forgotten.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JONATHAN M. STEIN
RICHARD WEISHAUPT

Community Legal Services, Inc.
Sylvania House
1324 Locust Street
Philadelphia, Pennsylvania 19107

MARK KAUFMAN

Delaware County Legal Assistance
410 Welsh Street
Chester, Pennsylvania 19013

APRIL 20, 1989